## MOHINDAR SINGH AND ANOTHER v. REX.

[Privy Council (Lord Greene, Lord Simonds and Lord Morton of Henryton) March 13, 1950]

[Privy Council Appeal No. 37 of 1949]

*Criminal Procedure Code, ss. 296, 299, 300, 302, 310 and 315 — Whether the Public Prosecutor has a right of appeal against sentence — Error in law or in fact.*

In this case the appellants had been convicted in the District Court of Singapore of offences against the Prevention of Corruption Ordinance (No. 41 of 1937) and sentenced to fines, the first appellant to fines of $3,000.00 and $10.00 (he having been convicted on two charges) and the second appellant to a fine of $1,000.00. The Deputy Public Prosecutor appealed to the High Court on the ground that the sentences were inadequate and on appeal sentences of rigorous imprisonment were added, 18 months in the case of the first appellant and 12 months in the case of the second appellant. The appellants applied for leave to appeal to the Privy Council and by an Order in Council dated the 25th November 1949 special leave was granted, the appeal being limited to the question whether the appeal by the prosecution was incompetent and whether the Appellate Court had jurisdiction to entertain such appeal or to make any order thereon other than an order of rejection thereof.

Held, that an appeal against sentence like an appeal against a judgment or order must, under the Criminal Procedure Code of the Straits Settlements, be in respect of an error in law or in fact and that therefore the Public Prosecutor cannot maintain an appeal against sentence upon the sole ground that the sentence is inadequate.

*Cases referred to:—*

(1) *Public Prosecutor v. Rudguard* (1938) F.M.S.L.R. 215; (1939) M.L.J. 56.

(2) *Kishan Singh v. The King-Emperor* L.R. 55 I.A. 390.

(3) *Sayyapureddi v. The King-Emperor* L.R. 48 I.A. 35.

CRIMINAL APPEAL from an Order of Murray-Aynsley, C.J. (Singapore).

*W. W. K. Page, K. C.* and *R. Parikh* for the appellants.

*F. Gahan* for the respondent.

**Lord Greene**: — This is an appeal by special leave from a judgment of the High Court of the Colony of Singapore dated the 1st June, 1949. The appellants had been convicted in the First District Court of offences against the Prevention of Corruption Ordinance (No. 41 of 1937). The first appellant, Mohindar Singh, was sentenced to fines amounting to $3,000 and $10 (he having been convicted on two charges) and the second appellant, Mohan Singh, was sentenced to a fine of $1,000. The sum of $2,000 given by the second appellant as a bribe was ordered to be confiscated. The Deputy Public Prosecutor appealed to the High Court on the ground that these sentences were inadequate and by its order the High Court (Murray Aynsley C.J.) increased the sentences by adding terms of rigorous imprisonment, 18 months in the case of Mohindar Singh and 12 months in the case of Mohan Singh. Neither of the appellants had appealed against either conviction or sentence and at the hearing in the High Court no objection to its jurisdiction to entertain an appeal by the Public Prosecutor or his deputy or to increase the sentences was taken. By the Order in Council dated the 25th November, 1949, granting special leave the appeal was limited to the question whether the appeal by the prosecution was incompetent and whether the Appellate Court had jurisdiction to entertain such appeal or to make any order thereon other than an order of rejection thereof. Their Lordships regret that these questions were not raised in the High Court since they are deprived of the assistance which a consideration of them by that Court would have afforded.

The appeal raises questions of importance for the administration of criminal justice in the Colony. They may be summarised as follows:—

(1) Had the Prosecution, under the Criminal Procedure Code in force, any right of appeal against sentence?

(2) If so, were the grounds of appeal adequate to support the appeal?

In addition to these two points raised on behalf of the appellants, a further point was taken on behalf of the respondent viz. that even on the assumption that the appellants succeeded on either of their two points the appeal should nevertheless be dismissed on the ground that in exercise of its powers of revision under the Code the High Court of its own motion had jurisdiction to increase the sentences and that in any event no injustice had been done.

At the material time the Criminal Procedure Code in force was the Code of 1910 as amended. Under it rights of appeal are given in respect of "any judgment, sentence or order pronounced by any District Court". The relevant sections may be summarised, or where necessary quoted, as follows:—

"296. — (1) No appeal shall lie from a judgment sentence or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

(2) No appeal is to lie in the case of certain minor offences.

"299. When an accused person has pleaded guilty and been convicted by a District Court or Police Court on such plea there shall be no appeal except as to the extent or legality of the sentence.

300. When an accused person has been acquitted by a District Court or Police Court there shall be no appeal except by the Public Prosecutor."

* * * *

"302. — (1) Except in any case to which section 296 applies any person who is dissatisfied with any judgment, sentence or order pronounced by any District Court or Police Court in a criminal case or matter to which he is

a party may prefer an appeal to the High Court against such judgment, sentence or order in respect of any error in law or in fact" . . . by lodging a notice of appeal and paying a fee. . . .

(4) The appellant must lodge a Petition of Appeal.

"(5) Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred."

(6) The appellant may be required to give security for costs.

"(7) In the case of an appeal by the Public Prosecutor no fee shall be payable nor shall any security be required."

The powers of the Court on an appeal are set out in sections 310 to 316 which so far as relevant provide as follows :—

"310. At the hearing of the Appeal the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal or may —

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry shall be made or that the accused shall be retried or committed for trial, as the case may be, or find him guilty and pass sentence upon him according to law;

(b) in an appeal from a conviction,

(1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction or committed for trial; or

(2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or enhance the sentence; or

(3) with or without the reduction or enhancement and with or without altering the finding, alter the nature of the sentence;

(c) in an appeal from any other order, alter or reverse such order."

(The words "or enhance" and "or enhancement" were first inserted in 1933).

* * * *

"315. No judgment, sentence or order of a District Court or Police Court shall be reversed or set aside unless it is shown to the satisfaction of the High Court that such judgment, sentence or order was either wrong in law or against the weight of the evidence."

It is to be noted that the powers conferred by section 310 are exercisable "at the hearing of the appeal" which in their Lordships' view means an "appeal" properly brought within the limits laid down by the earlier group of sections. But although the right of appeal itself and the powers exercisable by the Court upon an appeal are two different matters yet the two sets of provisions must be read as a whole. It is scarcely to be supposed that there would be a lack of coincidence between what are two parts of one coherent scheme.

Their Lordships will now address themselves to a consideration of the two points submitted on behalf of the appellants. It is not in dispute that if the Public Prosecutor (or his deputy — no distinction is to be drawn between them) has a right of appeal in the present case it must be found in section 302. That section confers the right of appeal there described on "any *person* who is dissatisfied with any judgment, sentence or order" etc. Mr. Page on behalf of the appellants maintained that the word "person" here does not include the Public Prosecutor. The Crown, he says, is the appellant and the Public Prosecutor merely represents the crown. He refers to the definition provisions in the Code. They contain no specific definition of the word "person" but section 2 incorporates the definition contained in section 11 of the Penal Code of 1872 which provides that :—

"The word 'person' includes any company or association or body of persons whether incorporated or not."

This definition, Mr. Page contended, is not apt to describe the Crown or the Public Prosecutor as representative of the Crown. On the other hand the position and duties of the Attorney General as Public Prosecutor are defined in chapter 34 of the Criminal Procedure Code and by section 402 (6) he and no other "person" is authorised to appear on behalf of the Crown in a criminal appeal. That he is recognised by the language of that Code as a "person" seems to their Lordships clear beyond dispute. He is referred to in section 300 as one having a right of appeal in the case of an acquittal and the language of the section is not so apt to confer a right not conferred elsewhere as it is to state an exception from a general prohibition against appeals where an accused person has been acquitted. This, in their Lordships' opinion, points strongly to the view that section 302 confers on the Public Prosecutor the right of appeal which section 300 thus preserves and it can only do so if he is included in the word "person". Further, sub-section (7) by dispensing with the payment of a fee and the provision of security "in the case of an appeal by the Public Prosecutor" is in the opinion of their Lordships a clear indication to the same effect. Mr. Page attempts to reconcile this sub-section with his proposition by suggesting that it refers not to a right of appeal given to the Public Prosecutor as a "person" within section 302 but to the special right of appeal which he says is conferred upon him *eo nomine* by section 300. Their Lordships cannot accept this contention. The language of sub-section (7), its position as a sub-section of section 302, the facts that it is only by virtue of that section and not by virtue of anything in section 300 that a fee and provision of security would be required and that if the sub-section was only intended to refer to the single case of the appeal referred to in section 300 it would naturally have been treated as a

proviso to that section satisfy their Lordships that the Public Prosecutor is a "person" having such rights of appeal as are conferred by section 302. A similar view was taken by Terrell Ag. C.J. in a case under the corresponding provisions of the Criminal Procedure Code of the Federated Malay States *Public Prosecutor v. Rudguard*[1].

The second of the two points taken on behalf of the appellants raises a more difficult question viz. whether the Public Prosecutor can maintain an appeal against sentence upon the single ground that it is inadequate. The contention of Mr. Page is that he cannot, that an appeal against sentence like an appeal against "judgment or order", must be in respect of an "error in law or in fact" and that inadequacy by itself is not sufficient. This argument is based on weighty considerations. They may be summarised sufficiently for present purposes somewhat as follows. The words "error in law or in fact" refer to all three matters in relation to which an appeal may be brought viz. "judgment, sentence or order". The phrases "error in law" and "error in fact" embody two distinct classes of error, they are technical phrases in common use in the law and their meaning is not in doubt. Questions of "law" and questions of "fact" may be combined in a question of "mixed law and fact" but the judicial process of dealing with any of these three classes of question is different in kind from the judicial process of exercising a discretion conferred by law such as the discretion exercised in the selection of an appropriate sentence. The phrase interpreted in its technical sense has sufficient content when applied to the case of sentences. In imposing the sentence the Court may have fallen into an error of law e.g. if the sentence imposed is greater than the law permits or is less than the law requires. There is more difficulty in finding a content for the phrase "error in fact" when applied to sentence. Their Lordships are, however, of opinion that there is a sufficient content in that in imposing a sentence the judge may have been misled by some error of fact. In any event an exercise of discretion which errs only on the side of leniency or severity cannot on that account alone be said to involve error either in law or in fact. It is conceded by Mr. Page that his interpretation restricts the right of appeal against sentence within narrow limits as regards both appeals by the convicted person himself and appeals by the Public Prosecutor: and also that it may lead to certain anomalous results.

The contrary argument derives its chief strength from the following considerations. To apply the phrase "error in law or in fact" in the case of sentence in the manner suggested involves too technical a construction which not only raises inconsistencies with other expressions in the relevant parts of the Code but leads to results so anomalous that the legislature cannot be supposed to have intended them. A striking inconsistency appears in section 299 where the appeal referred to is "as to the extent or legality of the sentence". Section 302 is the only section by which an appeal is affirmatively "provided" within section 296, and in section 299 the appeal is not "provided" but is merely excepted from a general prohibition against appeals in the case of acquittal. The appeal referred to in section 299 being therefore merely an example of the general right of appeal given by section 302, that general right must be interpreted as covering the example. This must mean, it is said, that the phrase "error in law or in fact" is intended to be wide enough to cover the case of complaint against a sentence on the sole ground of "extent" i.e. that it is either excessively lenient or excessively severe. Moreover it is said that a construction which treated section 299 as giving by some sort of implication a special right of appeal would lead to the anomalous result that whereas an appeal as to "extent"of sentence under section 299 not based on an alleged "error in law or in fact" (whether it be an appeal by the person convicted or by the prosecution), would be open where the accused person had pleaded guilty, but where he had not so pleaded it would be limited to cases of "error in law or in fact". It is further pointed out that under section 310 the court has power where there is an appeal against conviction on its own motion to reduce or enhance the sentence so that in a case where the appeal is against conviction alone the power of the court is apparently a power at large.

Their Lordships have carefully considered these and other arguments. They fully appreciate the importance of avoiding, so far as the words and context fairly and reasonably permit, a construction which would lead to anomalous or patently unreasonable results. On the other hand it is to be remembered that the desirability of avoiding such results must not be allowed to give to the language used a meaning which it cannot fairly and reasonably bear. If the legislature has used language which leads to such results it is for the court to give effect to it. The function of the court is interpretation, not legislation. The limits thus imposed on the court prevent the twisting of words and phrases into a sense that they cannot fairly and reasonably bear. Words having a technical meaning, words which are in effect words of art, are in essence more recalcitrant than words

which do not possess that character. Where the legislature selects technical words to convey its meaning it is not in general to be supposed that it uses them in any but their technical sense or that their technical sense was unfamiliar to it.

In spite of the difficulties raised by apparent inconsistencies and suggested anomalies to which Mr. Gahan for the respondent rightly calls attention, their Lordships are of opinion that they are not sufficient to justify an interpretation of the words "error in law or in fact" in any but the natural sense that they convey to one familiar with legal phraseology. If there are anomalous consequences it is for the legislature if it thinks fit to correct what has resulted from an infelicitous choice of words. But the suggested anomalies do not appear to their Lordships to arise of necessity. For example, the word "extent" in section 299 to which reference has been made need not, as it seems to their Lordships, be construed as having a scope going beyond error in fact or law. It seems to them preferable to read section 299 as a proviso to the general right of appeal given by section 302 and to construe the word "extent" in a sense subordinate to and consistent with the technical phrase "error in law or in fact" rather than to twist the sense of that phrase to make it accord with a wider meaning of the word "extent". The main difficulty caused by the interpretation which their Lordships feel constrained to adopt appears to them to be in the very strict limitation which it imposes on the permissible grounds of appeal against sentence as regards both undue severity and undue leniency. But although their Lordships cannot avoid the suspicion that the intentions of the legislature may well have been more generous in these respects, they are forced to the conclusion that the language chosen to give effect to such intentions, if they existed, was not well chosen for the purpose.

Before leaving this branch of the case their Lordships desire to refer to two matters. Their view, they think, is reinforced by a consideration which was strongly urged by Mr. Page. By sub-section (5) of section 302 "every" petition of appeal must contain "definite particulars of the points of law or fact" in regard to which error is alleged. This requirement is quite general and it is impossible to exclude from it the case of an appeal against sentence. It is wide enough to cover an appeal "as to the extent" of the sentence which is contemplated by section 299 and in their Lordships' view supports the limitation of the word "extent" which is suggested above. Now when the petition of appeal in this case is looked at there is, as Mr. Page convincingly points out, no particularisation of any error either of law or of fact. The only ground of appeal mentioned in it is "That a sentence of fine only in the circumstances of this case is manifestly inadequate as a deterrent of similar offences". It is on the ground of its inadequacy alone that the High Court increased the sentence.

The other matter appears to their Lordships to be at any rate useful as an illustration of the argument. It is common ground that, subject to variations, the Criminal Procedure Code of the Colony is, broadly speaking, based on the Indian Code. That Code has dealt with the difficulty that a sentence which is unimpeachable on the ground of error in law or in fact is a matter of discretion only and that if power to reduce it is to be given to an appellate court language apt for that purpose must be used. By section 418 of that Code (Act V of 1898) it is provided that an "appeal may lie on a matter of fact as well as a matter of law" except that in the case of a jury trial it is to lie on a matter of law only and the "Explanation" says that "the alleged severity of a sentence shall for the purposes of this section be deemed to be a matter of law". This appears to their Lordships to recognise that severity of sentence requires to be artificially brought within one or other of the two permitted categories, that of law being selected in order to cover the case of a jury trial. It is worthy of note that a similar device was adopted in the Code of Criminal Procedure of the Malay States (referred to above) where section 307 (i) gives a right of appeal "for any error in law or in fact" and sub-section (iv) adopts the language of the "Explanation" to section 418 in the Indian Code.

Having regard to the conclusion at which they have arrived their Lordships do not find it necessary to discuss at length certain other matters which were mentioned in argument. They may, however, make one observation. Their Lordships find no practical difficulty in the fact that in the Code as it now stands the opening words of section 302 (1) drop the reference which had appeared in the earlier Code of 1900, to what are now sections 299 and 300. Those two sections and section 302 itself must be read together in any case and reconciled with one another whatever may have led the legislature to drop the reference. Their Lordships see nothing in their having done so which can prevent section 302 giving a general right of appeal or can exclude the Public Prosecutor from the operation of the section.

It remains to consider the argument in opposition to the appeal which is based on the powers of revision given to the High Court. Those powers are contained in sections 317 to 324 of the Code. Sections 320 and 322 are the most important and they provide as follows :—

"320. — (1) The High Court may call for and examine the record of any proceeding before any inferior criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court."

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"322. — (1) The High Court may in any case, the record of the proceedings of which has been called for by itself or which otherwise comes to its knowledge, in its discretion exercise any of the powers conferred by sections 305, 309, 310 and 311 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by advocate in his own defence.

(3) Nothing in this section shall be deemed to authorise the High Court to convert a finding of acquittal into one of conviction."

Section 324 provides for certification by the High Court when it revises a case under these provisions. That section differs in language from section 313 which deals with certification of the result of an appeal and was the section followed in the present case.

Mr. Gahan for the respondent submits that although the matter was brought before the Chief Justice by way of appeal and the certificate was a certificate under section 313 the same order could have been made by the Chief Justice sitting in revision; that the reason why he did not so sit was that the petitioners had chosen not to raise the points now raised as to the competency of an appeal; that had those points been raised it would have been a simple matter of form for the Chief Justice to convert the sitting into a sitting in revision; that the only matter of substance discussed before the Chief Justice was whether or not the sentence ought to be increased; that the accused had the protection afforded by section 322 (2) in that they had the opportunity of being heard; and that in consequence no miscarriage of justice can be said to have taken place.

There appear to their Lordships to be a number of objections to this argument. It is based on the theory that the Board is entitled to treat the order appealed against as unobjectionable on the ground that it might have been validly made under a different section in exercise of a different statutory power. It was made on an appeal and their Lordships have already held that the appeal was not competent. It would therefore be necessary in order to give effect to the argument to substitute a valid decision under a notional exercise of the discretionary power of revision which the High Court never purported to exercise at all. It may be quite true that it was within the jurisdiction of that court to exercise that jurisdiction. But it would be without precedent for the Board to treat a discretionary power as having been exercised in order to support a decision made without reference to the power and without there being any intention in the court to exercise it. It is no doubt true that for practical purposes it was a discretion to increase the sentence which the court in fact purported to exercise under the jurisdiction which it was (wrongly as their Lordships have said) assuming on the appeal. But tempting though it might be to say that after all no harm has been done, their Lordships do not think that a sufficient ground for treating something as having been done which was not done. The discretion under the revision sections was not in fact exercised and it would be in their Lordships' opinion dangerous to suppose that different arguments might not have been advanced if the court had been to the knowledge of the accused acting in revision. Want of jurisdiction is, their Lordships think, too serious a matter to be treated in so casual a way. It has been spoken of in many judgments of the Board as one of the matters which lead to serious miscarriage of justice. Strict observance of the law as to jurisdiction is one of the fundamental rules in the administration of justice.

But their Lordships think that there is a special reason on the facts of this case for not accepting the argument advanced on behalf of the respondent. The Chief Justice did not have before him the arguments against the competence of the appeal which have been placed before their Lordships. In strictness it was for the court to dismiss the appeal as incompetent even though no objection on that ground was taken on behalf of the convicted persons. It is not surprising in the circumstances that this course was not taken and their Lordships do not suggest any criticism in that regard. But if the point had been taken and decided as it should have been decided a further question would have arisen. If the learned Chief Justice had then proceeded to act under the Revision sections it would have been open to the accused to argue that under those sections it was equally necessary for the court to base any exercise of its powers (which are referentially imported from the appeal section 310 into the revision section 322) on an error in law or in fact. It might have been argued that unless this was so the court would have been empowered not merely to alter a sentence but also to reverse a judgment of acquittal or conviction without the necessity of finding any error

in law or in fact at all, notwithstanding the presence of the words "correctness, legality or propriety" in section 320 which deals with a different matter. Their Lordships express no opinion on this topic. It is sufficient for them to say that the argument would have been a legitimate one and had it been successful the court would have been just as powerless to increase the sentence under the revision sections as it was under the sections relating to appeal. It would not in their Lordships' view be right to dismiss the appeal on the assumption, which is fundamental in Mr. Gahan's argument, that the court could clearly have done in revision what it was not competent to it to do on appeal i.e. to increase a sentence without there being any error in law or in fact.

Their Lordships should add that they do not accept Mr. Page's contention that the case is not one where it can be said that the record came "to the knowledge of the Court" within the section 322. They consider that the requirements of the section in that respect were duly satisfied. They also make no reference to the Indian cases of *Kishan Singh v. The King-Emperor*[2] or *Sayyapureddi v. The King-Emperor*[3] cited by Mr. Page. In those cases the questions of want of jurisdiction were of a different character.

Their Lordships will humbly advise His Majesty that the appeal should be allowed.

*Appeal allowed.*

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## *IN RE* JOSEPH AARON ELIAS, DECD.

**[Orig. Civ. Juris. (Murray-Aynsley, C. J.) March 23, 1950]**
**[Singapore — Originating Summons No. 67 of 1950]**

*Wills Ordinance — Specific gift — Whether gift takes effect.*

In this Originating Summons the question raised was one of interpretation of the following clause in the Will of the deceased: "I give and bequeath all the jewellery diamonds precious stones and gold deposited with me in the Hongkong and Shanghai Banking Corporation's Branch Bank in Bombay unto my sisters, Mrs. D. J. Elias, Mrs. Esther Manasseh and Mrs. D. Frankel to be divided amongst them equally." At the time of the death of the deceased there were no goods of that description deposited in the bank.

**Held**, that the gift in this case was a specific gift and that the recipients were therefore entitled to the collection that was at one time in the bank in question and which were clearly identifiable.

*Case referred to:—*

(1) *In re Whitby* (1944) 1 All E. R. 299.

ORIGINATING SUMMONS.

*C. H. Smith* for the Trustees of the Will of J. A. Elias (decd.).

*Sir Roland Braddell* for Mrs. D. J. Elias.

*S. H. D. Elias* for nephews and nieces of the deceased.

*Cur. Adv. Vult.*

**Murray-Aynsley, C. J.** : — The present question is one of interpretation of the following clause in the will of the deceased :—

"5. I give and bequeath all the jewellery diamonds precious stones and gold deposited with me in The Hongkong & Shanghai Banking Corporation's Branch Bank in Bombay unto my sisters, Mrs. D. J. Elias, Mrs. Esther Manasseh and Mrs. D. Frankel to be divided amongst them equally."

At the time of the death of the deceased there were no goods of that description deposited in the bank.

Consideration of the local equivalent of section 24 of the Wills Act is necessary.

Owing to the particular rule of construction imposed by that section unless a contrary intention "shall appear by the will" the gift fails owing to the fact that at the time of the death of the deceased there was nothing that answered to the description in the will.

It has been decided and is, I think, well established that a specific gift in a will in every case shows a contrary intention.

I think, therefore, that the answer to the question must depend on whether there is anything in the will that shows that the gift in question is specific and not generic.

I think that the use of the definite article can be taken as indicating that the deceased was referring to a particular collection of jewellery, etc. and not to any goods of that description that might at any future time be in the bank.

In the recent case of *In re Whitby*[1], it would appear that the use of the word "now" might have had a similar effect. I think that such a *ratio decidendi* would have been sounder than that adopted by Lord Greene, the then Master of the Rolls. It is interesting to note that a similar interpretation in the past would have deprived All Souls of part of the Codrington Library.

In the circumstances I consider that the gift takes effect and the recipients are entitled to the collection that was at one time in the bank in question and which the affidavit shows to be clearly identifiable.

*Order accordingly.*

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## UNITED STATES OF AMERICA v. YANG SOON EE & ANOTHER.

**[Orig. Civ. Juris. (Murray-Aynsley, C. J.) March 28, 1950]**
**[Singapore — Civil Suit No. 134 of 1950]**

*International Law — Claim against a ship in possession of persons who hold it on behalf of a Sovereign Government — Jurisdiction.*

In this case the plaintiffs issued a writ against the defendants, the acting captain and third officer respectively of a ship known as "Hai Hsuan", claiming that